No. 12,074

IN THE

United States Court of Appeals

For the Ninth Circuit

RICE GROWERS ASSOCIATION OF CALIFORNIA (a corporation),
Appellant,

vs.

REDERIAKTIEBOLAGET FRODE (a corporation), Owner of the Steamship "Frej",
Appellee.

MEMORANDUM IN OPPOSITION TO APPELLEE'S MEMORANDUM ON SCOPE OF REVIEW.

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FILED
MAY 28 1949
PAUL P. O'BRIEN,

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Rules

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Frode's Memorandum is entitled "Memorandum on Scope of Review" and purports to be filed in answer to a specific question raised by the Court at the oral argument (whether this Court has power to fix the limitation fund as of May 8, 1947, although Frode took no cross-appeal from the order of the District Court). In fact, however, the memorandum is not limited to that question but covers the entire case. We assume of course that that part of the memorandum which is thus unauthorized will not be read. Since it is possible, however, that the memorandum will be con-

sidered in its entirety, we hereby respectfully apply for leave to file the following answer thereto.

THE SCOPE OF THE REVIEW BY THIS COURT.

We have of course no quarrel with the contention of Frode that an appeal in admiralty results in a trial *de novo*. Our contention is, however, that the scope of that trial *de novo* is restricted to the issues raised by the specifications of error.

Frode cites two cases decided in 1887 and 1921 respectively by the Supreme Court of the United States. Those cases *(Irvine v. The Hesper,* 122 U.S. 256, 30 L. Ed. 1175, and *The John Twohy,* 255 U.S. 77, 65 L. Ed. 511) do seem to support Frode's contention. Frode does not cite, however, the later case of *Oxford Paper Co. v. The Nidarholm,* 282 U.S. 681, 75 L. Ed. 614, decided in 1931 by the Supreme Court of the United States, and which must be deemed to have overruled the two previous cases. In that case the charterer of the SS Nidarholm filed a libel in rem to recover damages for the loss of part of his cargo. The District Court held that the shipowner was alone at fault and awarded damages accordingly. On appeal by the shipowner, the Circuit Court of Appeals held that both the shipowner and the charterer were at fault and accordingly divided the damages. The Supreme Court then granted certiorari on petition of the charterer. The shipowner was apparently content with the decision that he was half to blame. The

Supreme Court concluded that the charterer alone was to blame, but nevertheless did not relieve the shipowner from his half of the damages, for the reason that the shipowner had not applied for certiorari.

Frode also relies on *Brooklyn Eastern District Terminal v. United States,* 287 U.S. 170, 77 L. Ed. 240, and *Callan v. Cope,* 165 F. (2d) 703. Neither of these cases is in point. They both recognize that an appeal in admiralty amounts to a trial *de novo,* but neither of them raises the question of whether the appellee can, without filing a cross-appeal, ask the appellate Court to review issues which are not covered by the appellant's specification of errors.

To hold, as Frode now suggests, that an issue can be raised at the oral argument on appeal, even though it was not assigned as error, does away with the requirements of Rule 35 of the Rules of this Honorable Court.

Frode also makes the preposterous contention that it would have been necessary for Rice Growers to expressly exclude the date of May 8, 1947, from its assignment of errors in order to preclude consideration of that date by this Court. In effect, Frode contends that it is necessary for an appellant to expressly state that it is not appealing from a ruling which is unfavorable to the other party. It is submitted that there is only one way to construe the assignments of errors filed by Rice Growers, whether the assignments be read as a whole or whether each of them be read separately. Rice Growers assigned as error

the ruling of the trial Court fixing June 19, 1947, the date of the termination of the voyage, and at $213,104.00 the amount of the limitation fund. As far as Rice Growers was concerned, those rulings were erroneous only in not fixing the termination of the voyage at a later date and the limitation fund at a greater amount. Since, as against a date prior to June 19, 1947 and as against an amount smaller than $213,104.00, the ruling of the trial Court was not erroneous, the assignments of errors filed by Rice Growers cannot possibly be construed as being broad enough to allow this Court to consider any date prior to June 19 and any amount smaller than $213,104.00.

THE UNAUTHORIZED PART OF FRODE'S MEMORANDUM.

On page seven of its memorandum, Frode cites several recent cases, which, with the exception of *The Lara,* 1947 A.M.C. 27, had not heretofore been cited by the parties. Those cases have one thing in common and that is that none of them has anything whatever to do with the question of the termination of the voyage raised in our case.

The Mattie, 34 F. S. 856, deals with the question of whether a petition for limitation should be denied because the owner of the vessel replaced her steering gear before surrendering her to a trustee, *not* with the question of the termination of the voyage.

The Edward Luckenbach, 1942 A.M.C. 1449, deals with the question of what docket fees are to be al-

lowed proctors for the cargo claimants in a limitation proceeding, *not* with the question of the termination of the voyage.

The Chickie, 54 F. S. 19, deals with the question of the privity and knowledge of the owner and the question of whether he can avail himself of the limitation statute, although he failed to either deposit security or surrender the vessel to a trustee, *not* with the question of the termination of the voyage.

Curtis Bay Towing Co. v. Tug Kevin Moran, 159 F. (2d) 273, deals with the question of whether an order refusing to dissolve an injunction is appealable and whether, assuming it to be appealable, the injunction should be dissolved, *not* with the question of the termination of the voyage.

We do not know why Frode cited those cases. It is true that each of them cites one or more older cases, such as *The City of Norwich,* 118 U.S. 468, 30 L. Ed. 134, which Frode has previously cited to this Court. It is claimed by Frode that those older cases held that "a catastrophe terminates the voyage". The fact is, however, that they do not so hold. Nor do the recent cases, which have themselves nothing whatever to do with the question of the termination of the voyage, cite the older ones for the proposition that "a catastrophe terminates the voyage". As was pointed out in our previous briefs, those older cases rather stand for the proposition that a voyage can be terminated short of destination only in the event that (1) the vessel is a total loss, or (2) the vessel is so damaged as to make

it unreasonable for her owner to repair her, or (3) the voyage was in fact commercially frustrated.

It is submitted that the 1936 amendment to the Limitation Statute was merely procedural and was only intended to "require the shipowner to act promptly in asserting the right to limit his liability." (*Petition of Goulandris,* 140 F. (2d) 780, 781.) Although no case has actually passed upon the question of whether, since the 1936 amendment, limitation can be had before the end of the voyage, the Supreme Court has made it clear, by the recent amendment to Rule 51 of its Admiralty Rules, that the limitation fund must now, as it had to before 1936, be fixed as of the end of the voyage. Rule 51 now requires the petition for limitation of liability to set forth:

> "the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings or proceeds, if any * * *"

Rule 51 further provides that the *ad interim* stipulation shall be for:

> "the value of petitioner's interest in the vessel at the close of the voyage or, in the case of wreck, the value of the wreckage, strippings or proceeds, * * *"

It is therefore clear that Rule 51 supports the position which has been that of Rice Growers throughout this case, namely, that limitation can be had only as of the time when the vessel actually arrived at destination, or as of the time when a wreck in fact terminated her voyage.

Frode still argues that the "Frej" was "a helpless wreck, aground, requiring repairs in excess of 150% of its value". The fact is, however, that she was not a helpless wreck, that she was beached for convenience and that she was repaired for less than 61% of her repaired value. $167,498.99 were expended for repairs and her value, when she resumed the voyage, was $275,000. Although it is true that the cost of repairing the "Frej" exceeded her value as of May 8, 1947, the significant fact is that the cost of repairing her did not exceed her value when repaired. Frode expended $167,498.99 (instead of abandoning $106,000) and thereafter had a ship worth $275,000.

To say that a vessel which was repaired and completed her voyage was a "helpless wreck" (as stated by Frode) or "wreckage and strippings" (as contemplated by Supreme Court Admiralty Rule 51) is to do violence to the truth.

In any event, and even if, as suggested by Judge Denman at the oral argument, the 1936 amendment to the limitation statute be held to give the shipowner the right to terminate a voyage at any time he pleases in order to secure limitation as of that time, it is clear that that right can become effective only from the time when the shipowner claims the benefit of the limitation statute.

If the Frej was in fact a total loss on May 8 or *if* her voyage was commercially frustrated on that day, Frode was entitled to invoke the benefit of the limitation statute as of that date, irrespective of the effect of the 1936 amendment, for her voyage was ended on

that date. If, however, she was not a total loss on May 8 and her voyage was not then commercially frustrated, it was necessary for Frode to await the end of her voyage, or, if the theory suggested by Judge Denman be adopted, it was necessary for Frode to terminate that voyage by the filing of a petition for limitation of liability and the posting of the necessary security. (*Petition of Goulandris,* 140 F. (2d) 780.) The abortive notice of abandonment of June 19 was not enough; it was nothing but an attempt by Frode to escape its contractual obligations. If the statute now gives the right to terminate the voyage as soon as claims in excess of the value of the vessel have been filed with her owner, it must be required of the owner, before the voyage can be said to have been terminated, that he comply with the statute by filing a petition for limitation of liability and by posting the necessary security or surrendering his vessel to a trustee. *In our case, those requirements were not fully complied with by Frode until August 4, 1947, and that date is accordingly the earliest date as of which Frode can possibly be entitled to limit its liability.*

We have no quarrel with the proposition that the limitation statute must be liberally construed in order to encourage investment in shipbuilding and with the cases cited by Frode in support of that proposition. It should be emphasized, however, that neither *Coryell v. Phipps,* 317 U.S. 406, 87 L. Ed. 363, nor *Just v. Chambers,* 312 U.S. 383, 85 L. Ed. 903, have anything whatever to do with the question of valuation. The latter case deals with the question of the enforceability

in Admiralty of claims for personal injuries against the estate of a deceased shipowner. In the former case, the Court was concerned with the question of privity and knowledge of the shipowner. The only case which we have found dealing with the question of whether the statute should be given a strict or liberal construction on the issue of valuation is the case of *La Bourgogne,* 210 U.S. 95, 52 L. Ed. 973. In that case, in referring more particularly to the freight portion of the limitation fund, the Court stated at page 992 of 52 L. Ed.:

> "the duty to surrender pending freight to entitle to a limitation of liability must be liberally construed *against* the shipowner." (Italics supplied.)

Moreover, there is no construction of the statute involved in this case, unless of course the suggestion made by Judge Denman be adopted. The statute otherwise needs no construction for the simple reason that it has been repeatedly construed and that it is settled that valuation must be made as of the end of the voyage.

In conclusion, to use the language of the English Court of Appeal:

> "It is absurd to argue that the shipowner can say that he was prevented from fulfilling his contract by perils of the sea by reason of great expense of repairing, when he did in fact repair and proceed upon a voyage." (*Assicurazioni Generali v. S.S. Bessie Morris Co.* (VII Aspinall's Reports (N.S.) 217.)

The "Frej" *did* complete her voyage (Havana); the "close of the voyage" (Supreme Court Admiralty Rule 51) *was* Havana. The limitation fund must accordingly be taken as of the time and place set by all the cases and the Supreme Court in its Admiralty rules. That time and place was September 18, 1947, in Havana.

Dated, San Francisco,
May 27, 1949.

Respectfully submitted,
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Proctors for Appellant.